

STATE OF NEW JERSEY  
OFFICE OF THE ATTORNEY GENERAL  
DEPARTMENT OF LAW & PUBLIC SAFETY  
DIVISION ON CIVIL RIGHTS  
DCR DOCKET NO.EV19HB-66919

██████████,	)	
	)	<u>Administrative Action</u>
Complainant,	)	
	)	<b>FINDING OF PROBABLE CAUSE</b>
v.	)	
	)	
Salem Management,	)	
	)	
Respondent.	)	

██████████ (Complainant) filed a verified complaint on March 27, 2018 with the New Jersey Division on Civil Rights (DCR) alleging that his former employer, Salem Management (Respondent), violated the New Jersey Law Against Discrimination (LAD) N.J.S.A. 10:5-1 to -49, by discharging him based on his disability. Respondent denied the allegations of discrimination in their entirety.

Respondent is a real estate management company with an office in Union, New Jersey. It states that it oversees more than 5,000 rental units at 40 locations in New Jersey.

Complainant was hired by Respondent on May 24, 2016, as a superintendent/construction worker assigned to Nutley Manor, Respondent's 29-unit complex located at 17 Church Street in Nutley. Complainant's job duties consisted of making general repairs, collecting rent, cleaning and showing apartments, and performing tasks as needed to maintain the building and grounds. In July 2016, Complainant was assigned to perform similar work at Respondent's Montclair Arms apartment building as well as Nutley Manor and, on occasion, at other of Respondent's locations as needed. In addition to his salary, Respondent provided Complainant a rent credit of \$1,300.00 per month that was applied to an on-site apartment.<sup>1</sup>

Complainant stated that on February 2, 2018, he sustained an injury at work, hurting his back and fracturing his ribs. Complainant provided Respondent with medical documentation that indicated his injuries would keep him out of work through March 8, 2018, at which time his physician released him to return to work with certain temporary restrictions: no lifting more than 10 pounds, no repetitive bending, standing and sitting as tolerated, 20 minutes of rest every two hours.<sup>2</sup> Complainant submitted this information to Respondent on May 8, 2018. Complainant

<sup>1</sup> Complainant initially lived in Respondent's Montclair Arms apartment building. In January 2018, he requested and was granted permission to reside at Nutley Manor.

<sup>2</sup> Separate medical documentation provided by Complainant indicated that he was released by his physician for full-time work without restrictions on April 6, 2018.

stated that the following day, March 9, he received notification that he was being terminated effective the close of business that day as his job was being eliminated. He was also instructed to vacate his apartment within three days.

In its response to the verified complaint, Respondent asserted that Complainant's separation from employment was due to his position being eliminated and that his injury was not a factor in its decision. It provided DCR a copy of the letter dated March 8 that it hand-delivered to Complainant on March 9, which indicates that he was being terminated because his position was being eliminated. It also provided a copy of a "3 day Notice to Quit" instructing Complainant to vacate on or before March 13, 2018. Respondent explained in an email to DCR dated May 10, 2019, that Complainant's tenancy was conditioned on his employment and, since he was no longer an employee, he was no longer entitled to reside in one of Respondent's apartments.

Complainant disputed that his termination was a result of his position being eliminated. He provided DCR with a copy of a notice sent to the residents of Nutley Manor Apartments dated March 14, 2018, five days after his termination, wherein Respondent was seeking a part-time rental agent for Nutley Manor. Complainant said it listed duties that he previously performed. In addition, Complainant provided DCR with a copy of an ad from the website [www.craigslist.org](http://www.craigslist.org) that he found online on April 3, 2018. Although there was no indication of when the ad was initially placed, the ad stated that Respondent was seeking a full-time Superintendent/Crew Team Member for its 29-unit residential complex in Nutley, New Jersey. Nutley Manor is the only property managed by Respondent in Nutley. Finally, Complainant provided a copy of a notice dated April 4, 2018 distributed to "All Residents Nutley Manor Apartments" announcing a "part-timeresident manager [REDACTED] at Nutley Manor Apartments."

DCR questioned Respondent about the Craigslist employment ad. Documents provided by Respondent indicated that the ad for the superintendent position for the Nutley property was initially placed on February 28, 2018, less than four weeks after Complainant sustained his injury and while Complainant was still employed. DCR also requested and Respondent provided a spreadsheet identifying all employees who held the title superintendent and maintenance worker. This document indicated that Respondent employed a total of 69 individuals with these titles; none of those individuals was [REDACTED]. While the document did not reflect a specific person assigned to Nutley Manor following Complainant's termination, DCR learned during an interview with [REDACTED], an employee of Respondent identified as the superintendent at Montclair Arms, that a superintendent residing at the nearby Glen Ridge Manor Apartments, [REDACTED], was also assigned to perform work at Nutley Manor. When asked, Respondent told DCR that [REDACTED] was hired on March 5, 2018, five days after the ad was initially placed on Craigslist. Respondent denied that [REDACTED] was hired to replace Complainant and asserted that [REDACTED] was assigned superintendent responsibilities at a property in Dover, New Jersey and was one of a number of workers who would respond as needed to the Nutley complex. Respondent did not explain, however, why the ad it placed on Craigslist specifically identified the Nutley property as the worksite.

Respondent was also asked about the hiring of [REDACTED], and why his name was not included on the list of superintendents provided to DCR. Respondent was also asked why it had not offered the part-time position held by [REDACTED] to Complainant. In an email to DCR dated April 19, 2019,

Respondent asserted that [REDACTED] is not an employee and that his position as a rental agent takes up only about five hours per week. Respondent stated that in consideration for his time, estimated at approximately 20 hours per month, [REDACTED] is given a monthly rental credit estimated to be \$650.

Respondent was also questioned about its attempt to evict Complainant from the apartment where he lived as an employee. Respondent stated that there was no attempt to evict Complainant and that any perception that there was an eviction was merely a misunderstanding on Complainant's part when workers were attempting to change the locks on his apartment for legitimate business reasons. Respondent stated that Complainant was no longer an employee but his key was a master that could be used to gain access to areas such as tenant apartments and employee only areas. Notwithstanding its representations, Respondent's submissions to DCR included a copy of a Notice to Quit dated March 9, 2018 that was provided to Complainant advising him to vacate the apartment within three days. Respondent told DCR that the Notice to Quit is "provided with the notice of termination as a matter of course since rent is not paid by the employee." In a May 10, 2019 email, Respondent wrote that Complainant was confusing two separate events. When he refused to leave his apartment, Respondent proceeded with legal action and the Court issued an order to vacate.

### **Analysis**

At the conclusion of an investigation, the DCR Director is required to determine whether "probable cause exists to credit the allegations of the verified complaint." See N.J.A.C. 13:4-10.2. "Probable cause" for purposes of this analysis means a "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief that the [LAD] has been violated." Ibid. If the Director determines that probable cause exists, the complaint will proceed to a hearing on the merits. See N.J.A.C. 13:4-11.1(b).

A finding of probable cause is not an adjudication on the merits. It is merely an initial "culling-out process" in which the Director makes a threshold determination of "whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits." Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), cert. den., 498 U.S. 1073. Thus, the "quantum of evidence required to establish probable cause is less than that required by a complainant in order to prevail on the merits." Ibid.

The LAD prohibits employers from discharging an employee because of his disability. N.J.S.A. 10:5-12(a).

To establish a prima facie case of discharge on the basis of disability, a complainant must show that: (1) he has a disability within the meaning of the LAD; (2) he was performing in the position from which he was terminated; (3) he was fired; and (4) the employer thereafter sought someone else to perform the same work. Zive v. Stanley Roberts, Inc., 182 N.J. 436, 457-58 (2005). Once this showing is made, a respondent bears the burden of articulating a legitimate and nondiscriminatory reason for the termination. Id. at 458. The complainant can then show that the reasons advanced by the respondent are a pretext for discrimination and his disability was a substantial motivating factor in Respondent's decision to terminate him. Ibid.

Here, Respondent does not contest that Complainant had a disability within the meaning of the LAD following his workplace injury. Complainant was employed with Respondent for almost two years when he suffered a work-related injury sufficient to cause him to be unable to work for almost five weeks. Complainant notified Respondent immediately when he learned he could return with temporary restrictions. Complainant was terminated the next day. And at this stage in the process, Complainant has produced sufficient evidence for the Director to find that Respondent sought others to perform the work Complainant was performing at Nutley Manor.

Respondent told DCR that Complainant's disability was not a factor in his termination and introduced a legitimate, nondiscriminatory reason for complainant's termination: that his position was eliminated. However, the evidence collected during the investigation raises a reasonable suspicion that this reason is a pretext for discrimination. While Respondent claims Complainant's position was eliminated, it nonetheless posted an advertisement for what appears to be Complainant's job duties while Complainant was on medical leave and still employed. And around the time Complainant was terminated, Respondent hired a superintendent to provide services to Nutley Manor as well as a part-time rental agent for Nutley Manor, both of which were duties previously performed by Complainant.

The LAD also requires an employer to make a "reasonable accommodation to the limitation of any employee or applicant who is a person with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business." N.J.A.C. 13:13-2.5(b). The determination as to whether an employer has failed to make reasonable accommodations is made on a case-by-case basis. Ibid. Here, Complainant notified Respondent of several temporary accommodations he would need upon returning to work from medical leave. Respondent, however, failed to engage Complainant in any type of interactive process about the requested accommodations to determine if they could be provided without undue hardship, and terminated his employment the day after he made the request.

In light of the above, the Director finds that there is probable cause to believe that Respondent violated the LAD when it failed to engage in an interactive process to determine whether it could accommodate Complainant's light duty restrictions and instead terminated his employment. Accordingly, the Director finds that this matter should "proceed to the next step on the road to an adjudication on the merits." Frank, 228 N.J. Super. at 56.

Date: October 29, 2019

A handwritten signature in blue ink, reading "Rachel Wainer Apter", enclosed in a rectangular box.

Rachel Wainer Apter, Director  
NJ Division on Civil Rights